

Sum

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

Present:

**HON. LAWRENCE J. BRENNAN
Acting Justice Supreme Court**

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**GERARD A. MALONE, JAMES B. MALONE and
PHYLLIS MALONE, as Administrators of the
Estates of AGNES GERALDINE MALONE and
PETER R. MALONE, deceased.**

Plaintiffs,

-against-

GRAND AM RECREATIONAL VEHICLES, INC.,

Defendants.

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GRAND AM RECREATIONAL VEHICLES, INC.,

Third-Party Plaintiff,

-against-

**SUNNYBROOK R V., INC., and PATRICIA A.
PEKAR,**

Third-Party Plaintiff.

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**TRIAL PART: 44
NASSAU COUNTY**

INDEX NO.: 16432/03

**MOTION DATE: 4-11-05
SUBMIT DATE: 6-17-05
SEQ. NUMBER - 001,**

**CROSS MOTION
DATE: 5-27-05
SUBMIT DATE: 6-17-05
SEQ. NUMBER - 002**

The following papers have been read on this motion:

- Notice of Motion, dated 3-30-05..... 1**
- Affirmation in Opposition, dated 5-5-05..... 2**
- Reply Affirmation, dated 5-23-05..... 3**

In this action, plaintiff seeks to recover damages allegedly sustained when plaintiffs' decedents were thrown from their Chevy Tahoe, which was towing a Sunnybrook

recreational vehicle that overturned. The recreational vehicle was purchased from the Defendant Grand Am Recreation Vehicle, Inc. The hitch that connected the recreational vehicle to the Malone's car was also purchased and installed by the Defendant Grand Am Recreational Vehicle.

The accident took place on July 28, 2002 in the town of Franklin, Massachusetts. Plaintiff's complaint alleges causes of action in negligence, strict product liability and breach of warranty against the Defendant, Grand Am Recreational Vehicle. Subsequently, the Defendant Grand Am Recreational Vehicle impleaded the third-party Defendants Sunnybrook and Patricia Pekar, the previous owner of the recreational vehicle. Patricia Pekar had sold the vehicle to the Defendant Grand Am Recreational Vehicle and the plaintiff decedents had purchased it from them. Specifically, the plaintiffs' Bill of Particulars alleges that the ball hitch was defective, had been installed improperly, and was the cause of the accident.

The Defendant third-party Plaintiff Grand Am Recreational brought a third-party indemnification/contribution action against Sunnybrook Recreational vehicle, Inc., and Indiana resident. It should be noted that the third-party action against previous Sunnybrook vehicle owner Patricia Pekar was discontinued. Likewise, third-party Defendant Sunnybrook discontinued all cross-claims against Patricia Pekar.

The remaining Third-Party Defendant, Sunnybrook Recreation Vehicle, Inc., moves for an Order granting summary judgment dismissing all claims against it. In this third-party action, Plaintiff Grand Am alleges Sunnybrook to have been negligent in its design,

manufacture, assembly, inspection, and specification of parts for the Sunnybrook trailer. This complaint seeks contribution/indemnity in the main action.

The initial bill of particulars in the third-party action made general allegations of negligence and products liability. The supplemental bill of particulars served pursuant to an Order of this court states that there are no claims of acts or omissions by the third-party Defendant Sunnybrook other than those alleged by plaintiff. The aforementioned plaintiff's bill of particulars refers to defective and negligent installation of the ball hitch by Defendant Grand Am. Hence, third-party defendant argues that the third-party claim against it can not be sustained and must be dismissed. *Ciriello v. Virgues*, 156 AD2d 417 (2nd Dept. 1989).

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557).

To prevail in this case, the movant third-party Defendant, Sunnybrook, must show by admissible evidence that there are no questions of fact with respect to its liability in this case.

In support of this application, the third-party Defendant, Sunnybrook, draws the Court's attention to relevant information and documentation gleaned from extensive discovery. There has been a full inspection of the towing vehicle, hitch and recreational

vehicle at issue.

In opposition, the defendant third-party plaintiff, Grand Am, refers to issues of fact which precludes the Court from granting the relief of dismissal of its third-party claim. Grand Am's referral to the uncertified Massachusetts State Police Collision Reconstruction Report concluding that the trailer exceeded the towing capacity of the towing vehicle can hardly be attributable to the trailer. The Court cannot speculate that this fact, assuming its accuracy, is a proximate or contributing cause of this accident.

This unsworn report indicates many factors which could have contributed to the tragic results in this case. The reference to the car's towing weight indicates the maximum trailer weight by 8100 pounds and the trailer weighed 8250 pounds, 150 pounds (2%) overweight. The report also opined that the collision cause was operator error while the driver failed to stay in lane.

These unsworn reports are insufficient to met Defendant Grand Am Recreational Vehicle burden of showing triable issues of fact. *Bates v. Yasin*, 13 AD3d 474 (2nd Dept. 2004). Furthermore, they are conclusory opinions which would, in all likelihood, be inadmissible at trial in this Court. Indeed, these opinions, if not based on personal observations of the reporting and investigating police officer(s), would likely be addressed by in limine preclusion motions and/or document redactions at trial. Thus, they are not reliable as evidence for purposes of this motion.

Another question of fact Grand Am raises is Sunnybrook's failure to warn the trailer's operator regarding the consequences of not adhering to the required towing vehicle's actual towing capacity. However, the sworn affidavit of Sunnybrook's president states that they sell

to distributors, such as third-party Defendant Grand Am, and that the distributors are charged with warning and explaining the towing weight capacities to consumers. Furthermore, the owner's manual does recommend compliance and towing capacities. There is no documentary evidence or sworn opinion as to any trailer design defect. *Bombara v. Rogers Bros., Corp.* 289 AD2d 356 (2nd Dept. 2001).

Furthermore, no evidence has been proffered of whether the decedents Agnes Geraldine Malone or Peter R. Malone knew of, or were aware of, or had been instructed in these or any warnings in the owner's manual. Thus, any implications inferred by the Court in this motion concerning these factors would be purely speculative.

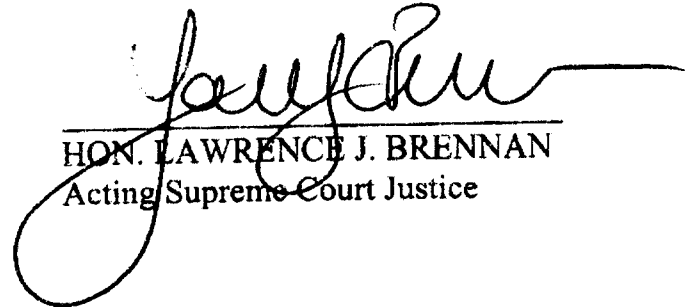
Likewise, the discovery sought by defendant third-party plaintiff in a request for discovery and inspection dated April 19, 2005 would not be dispositive of this motion. Requested information regarding studies of trailer sway or prior incidents of similar rollovers are not relevant to the specific facts of this case. These items are elaborations of warnings and directions contained in the owner's manual included as defendant third-party plaintiff exhibits.

In summary, the third-party Defendant Sunnybrook has met its burden of proof in showing the Court that there are no questions of fact with respect to liability on its part. Defendant Third-party Plaintiff Grand Am Recreational Vehicle has not met its burden of showing by admissible evidence, such as any expert's affidavit, that there are any questions of fact with respect to liability of the third-party Defendant, Sunnybrook. Thus, the motion is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 15, 2005



HON. LAWRENCE J. BRENNAN
Acting Supreme Court Justice

ENTERED

SEP 21 2005

FAIRFAX COUNTY
COUNTY CLERK'S OFFICE

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